

GAHC030000282024



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RSA/1/2024

Sh. Jonah Lalrempuia
S/o Vawma Gangte,
R/o Durtlang Leitan, Aizawl, Mizoram

VERSUS

Smt. Lalhmuchhuaki
W/o Vanlalvena,
R/o Chhing Veng, Aizawl, Mizoram

Advocate for the Petitioner : Mr. C Lalfakzuala

Advocate for the Respondent : Mr B Lalramenga

B E F O R E
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

02.09.2024

Heard Mr. C Lalfakzuala, learned counsel for the appellant. Also heard Mr. B Lalramenga, learned counsel for the sole respondent. The appellant has filed the present regular second appeal, praying for setting aside the impugned Order dated 27.07.2023 passed by the Court of the learned Addl. District Judge, Aizawl in CMA No. 160/2023 and Order dated 27.07.2023 passed in RFA No. 5/2023.

2. The brief facts of the case is that the respondent had filed Money Suit No.

138/2018 against the appellant, praying for recovery of money that he had lent to the appellant as loan. The appellant not having appeared through counsels, despite having executed Vakalatnama in favour of his counsels, the learned Trial Court dismissed Money Suit No. 138/2018, vide ex-parte Judgment & Order dated 05.08.2020 and Decree dated 05.08.2020, decreeing that the appellant should make repayment of the loan amount to the respondent.

3. The appellant thereafter filed RFA No. 5/2023, vide Order dated 27.07.2023, challenging the *ex parte* judgment & decree passed against him in Money Suit No. 138/2018. Alongwith the RFA No. 5/2023, the appellant also filed CMA No. 160/2023, praying for condoning the delay of 934 days in filing the appeal.

4. The First Appellate Court, i.e. the Court of Addl. District Judge, Aizawl dismissed CMA No. 160/2023, as the appellant failed to appear before the First Appellate Court. The Regular First Appeal i.e. RFA No. 5/2023 was also dismissed in line with the Order dated 27.07.2023 passed in CMA No. 160/2023.

5. The appellant thereafter filed CMA No. 672/2023 arising out of RFA No. 5/2023, praying for setting aside the Orders dated 27.07.2023 and to restore RFA No. 5/2023 alongwith CMA No. 160/2023. The same was dismissed by the First Appellate Court vide Order dated 30.10.2023.

6. The petitioner's counsel submits that in the meantime the respondent has also filed Execution Case No. 35/2022, pursuant to the Judgment & Order and decree passed in Money Suit No. 138/2022. He submits that the First Appellate Court could not have passed the impugned orders, inasmuch as, the learned First Appellate Court failed to satisfy itself and appreciate the fact that the appellant was not properly represented in the Trial Court and further, there was no record to show that the appellant intentionally absented himself from the Court proceedings,

as the appellant was neither summoned nor informed by his counsel to appear before the Court. He submits that the First Appellate Court failed to satisfy itself that summons had been issued to the appellant in terms of Order-V Rule 3 CPC.

7. The learned counsel for the appellant submits that justice demands that both the parties should have been heard, prior to the impugned judgment having been passed.

8. Mr. B Lalramenga, learned counsel for the respondent, on the other hand, submits that the appellant has not made a challenge to the Order dated 30.10.2023 passed in CMA No. 672/2023, which is an application for re-admission of an appeal dismissed for default. He submits that unless the appellant puts the Order dated 30.10.2023 passed in CMA No. 672/2023 arising out of RFA No. 5/2023 under challenge, the appellant cannot put to challenge the impugned Orders dated 27.07.2023 passed in CMA No. 160/2023 and RFA No. 5/2023.

9. I have heard the learned counsels for the parties.

10. As can be seen from the submissions enumerated above, the Money Suit was decreed in favour of the sole respondent/plaintiff *ex parte*, as the appellant was not represented by his counsel before the Trial Court. The condonation of delay filed by the appellant, for the late submission of his appeal, was dismissed by the First Appellate Court, due to the appellant not being represented before the learned First Appellate Court. The First Appellate Court had rejected the appellant's application for condonation of delay vide Order dated 27.07.2023 passed in CMA No. 160/2023, by quoting Order IX Rule 9 CPC, as the appellant had not appeared before the First Appellate Court.

11. RFA No. 5/2023 was disposed of by the learned First Appellate Court in terms of the Order dated 27.07.2023 passed in CMA No. 160/2023.

12. Order IX Rule 8 CPC relates to dismissal of a suit when the defendant appears and the plaintiff does not appear at the time of trial, unless the defendant makes an admission with regard to a part or whole of the claim made by the plaintiff. The mistake on the part of the First Appellate Court in mentioning a wrong provision of law i.e. Order IX Rule 8 CPC, instead of Order XLI Rule 11 or 17 CPC, while dismissing CMA No. 160/2023, does not take away the validity of the Order dated 27.07.2023 passed in CMA No. 160/2023, as per the law laid down by the Supreme Court in ***H.L. Mehra vs. Union of India***, reported in **(1974) 4 SCC 396**, where it was held that mention of a wrong provision of a statute in an order does not make the order invalid, if it otherwise had the power to pass the order under any other provision.

13. The appellant had put to challenge to Order dated 27.07.2023 passed in CMA No. 160/2023 and RFA No. 5/2023, vide CMA No. 672/2023 arising out of RFA No. 5/2023, by praying for setting aside the dismissal order dated 27.07.2023 and for restoration of RFA No. 5/2023.

14. On a perusal of the application submitted by the appellant, challenging the Orders dated 27.07.2023 passed in CMA No. 160/2023 and RFA No. 5/2023, this Court finds that the appellant has not invoked any provision of the CPC, to make a challenge to the above impugned orders. However, a reading of the provisions of Order XLI CPC goes to show that a challenge can be made to an order dismissing an appeal on grounds of default, in terms of Order XLI Rule 19 CPC, which is quoted herein below as follows:-

“19. Re-admission of appeal dismissed for default.—Where an appeal is dismissed under rule 11, sub-rule (2) or rule 17, the appellant may apply to the Appellate Court for the re-admission of the appeal, and where it is proved that he was prevented by any sufficient cause from

appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit."

15. In the view of this Court, CMA No. 672/2023 is an application made under Order XLI Rule 19 CPC, inasmuch as, it can be implied that CMA No. 160/2023 had been dismissed under Order XLI Rule 11 or Rule 17 CPC. Though the appellant had the opportunity to file a second appeal on the rejection of CMA No. 160/2023 and RFA No. 5/2023, the appellant had availed of the provisions of Order XLI Rule 19 CPC, for challenging the impugned Orders dated 27.07.2023. Unless the appellant makes a challenge to the impugned Order dated 30.10.2023 passed in CMA No. 672/2023, the appellant cannot make a challenge to the above Orders dated 27.07.2023 passed in CMA No. 160/2023 and RFA No. 5/2023, as an appeal against the order of refusal under Rule 19 of Order XLI to re-admit the appeal is required.

16. In the case of ***Shyam Sundar Sarma V. Pannalal Jaiswal & Ors., (2005) 1 SCC 436***, the Supreme Court held that when a condonation of delay application is dismissed by the First Appellate Court, which results in the appeal being dismissed, a second appeal lies from the consequential order dismissing the appeal. However, in the present case, the appellant had challenged the impugned orders dated 27.07.2023 vide CMA No. 672/2023, before filing the present appeal. An order made under Order XLI Rule 19 CPC is an appealable order under Order XLIII Rule 1(t) CPC, while the present appeal has been made under Section 100 CPC.

17. In view of the above provisions of the CPC, this Court does not find any ground to allow the present appeal, as the challenge has to be made to the order dismissing CMA No. 672/2023 and the same has to be made in terms of Order XLIII Rule 1(t) CPC. The appeal is accordingly dismissed.

18. It is needless to add that the appellants can always avail the correct procedure provided in the CPC for challenging the above said orders, if so advised.

JUDGE

Comparing Assistant